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August 20, 1997

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

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AUG 20 1997

REC'D
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

Re: *Notice of Inquiry, Docket No. CS 97-141*

Dear Secretary Caton:

Enclosed for filing are an original and four copies of the American Public Power Association's reply comments in response to the Commission's Notice of Inquiry on competition in the cable industry. A diskette containing an electronic copy is also enclosed.

Kindly also time-stamp and return the additional copy to the messenger.

Sincerely,


James Baller

Enclosures

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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AUG 26 1997

In the Matter of)	
)	
Annual Assessment of the Status of)	CS Docket No. 97-141
Competition in Markets for the)	
Delivery of Video Programming)	

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

**REPLY COMMENTS OF
THE AMERICAN PUBLIC POWER ASSOCIATION
IN RESPONSE TO THE COMMISSION'S NOTICE OF INQUIRY**

The National Cable Television Association (NCTA), the Small Cable Business Association (SCBA) and a handful of other commenters have asked the Commission to urge Congress to eliminate the exemption from federal pole attachment requirements that government-owned entities, cooperatives and railroads have always had. In these reply comments, the American Public Power Association (APPA) responds to the opening comments of the proponents of eliminating the exemption and submits that they have failed to prove that doing so is necessary, workable or consistent with the policies underlying the Telecommunications Act of 1996.

Interest of APPA

APPA is the national service representative of the Nation's approximately 2,000 publicly-owned, not-for-profit electric utilities located in all states except Hawaii. These public power systems, which are operated by municipalities, counties, states and public utility districts, provide electricity to approximately 35 million Americans. Several of APPA's members serve large cities -- including Anaheim, CA; Austin, TX; Cleveland, OH; Jacksonville, FL; Los Angeles, CA; Nashville, TN; and Seattle, WA -- but about three-quarters serve smaller communities with populations of 10,000 or less.

For more than a century, public power systems have brought essential competition to the electric power industry, which has given public power communities reliable service at the lowest

possible rates. Absent federal, state and local barriers, public power systems could now help bring effective local competition to the field of telecommunications, either by providing telecommunications services themselves or by making their telecommunications facilities available to other providers of such services.

All of APPA's members, large and small, would be damaged if Congress eliminated their exemption from federal pole-attachment requirements. The harm to APPA's smaller members and their communities would be especially great because they generally lack the resources and data bases necessary to comply with the Commission's highly complex pole-attachment requirements.

I. THE RECORD DOES NOT SHOW THAT GOVERNMENT-OWNED ENTITIES ARE CHARGING EXCESSIVE POLE ATTACHMENT RATES

NCTA, SCBA and other proponents of eliminating the exemption had every opportunity to convince Congress to do so as part of its overhaul of federal pole-attachment regulation in Section 703 of the Telecommunications Act of 1996. They failed, and Congress conspicuously left the exemption intact. Given this recent history, APPA submits that it would be inappropriate for the Commission to advise Congress that it was wrong unless the Commission can point to strong evidence that significant, widespread and systematic abuses of the exemption are occurring. In this proceeding, the Commission has given NCTA, SCBA and their allies a full and fair opportunity to come forward with such evidence, but they have not done so. The Commission should therefore close the books on this issue, once and for all.

Specifically, the proponents of eliminating the exemption have collectively listed less than a dozen cases in which government-owned entities are supposedly charging, or proposing to charge, excessive pole attachment rates. As APPA will show below, none of these claims individually

withstands analysis. Before turning to the specifics, however, APPA urges the Commission to put this handful of cases into context.

APPA represents more than 2,000 publicly-owned electric utilities and there are many other kinds of government-owned entities that lease space on their poles. Many of these electric utilities and other government-owned entities -- perhaps most -- have pole-attachment agreements with several parties. Even if all the claims of abuse in the record were correct, they would represent only a tiny fraction of these agreements. Thus, when viewed in the light most favorable to the proponents of eliminating the exemption, the record in this proceeding fails to support the conclusion that significant, widespread and systematic abuses are occurring. To the contrary, the absence of many more examples of alleged abuse is strong evidence that the exemption is working.

Furthermore, the “evidence” that NCTA, SCBA and US WEST present does not support their claims of abuses. First, in some cases NCTA and SCBA do not even name the government-owned entity in question. These cases do not constitute evidence but rumors that do not merit any weight.

Second, in several cases NCTA and SCBA contend that a government-owned entity is charging excessive pole attachment rates because it has recently raised rates by a substantial percentage over prior rates. A substantial percentage increase, however, does not necessarily result in unreasonable or excessive rates. For a variety of locally-based reasons, government-owned entities have often negotiated lower pole attachment rates than their costs or market conditions might have justified. If some are now attempting to catch up in this period of rapidly-escalating costs, it is not surprising that percentage increases may appear high in some instances.

Third, in other cases NCTA and SCBA argue that the disparity in rates charged by government-owned entities and comparable private entities shows that the government-owned entities are charging excessive rates. This argument is illogical. To be comparable, the government-owned

and private entities must offer similar services in the same market and have similar costs relating to their poles and pole attachments. If the entities that NCTA and SCBA compare are indeed comparable, then it follows that affected cable operators have competitive choices and do not need further federal regulation. On the other hand, if the government-owned entities and private entities are not truly comparable, then NCTA and SCBA have no valid basis for comparing their rates. Either way, the cases that NCTA and SCBA cite do not support their argument for eliminating the exemption.

Fourth, SCBA cites a survey indicating that its members pay an average of \$5.66 per pole to cooperatives and municipalities. This rate is excessive, SCBA suggests, because the Commission's data indicate that the national average is \$4.73 per pole. This argument, too, is flawed. For one thing, a rate that exceeds the national average is not necessarily excessive. The national average includes hundreds, if not thousands, of values above and below it. It conveys no information that is relevant to determining whether a particular rate is excessive or fair and reasonable, including regional or local conditions, historical factors, bargaining positions, in-kind and other non-price considerations, etc. National average data are particularly uninformative to the extent that they reflect the below-cost rates that government-owned entities have often charged.

Fifth, US WEST takes the Los Angeles Department of Water and Power (LADWP) to task for having *proposed* some allegedly unreasonable pole-attachment terms to one of US WEST's subsidiaries. Although the subsidiary succeeded in negotiating these terms away, US WEST is concerned that, unless the Commission eliminates the LADWP's exemption from federal pole-attachment requirements, it may resurrect these terms at some point in the future. APPA submits that, far from supporting elimination of the exemption, US WEST's comments confirm that the exemption is working well by encouraging parties to resolve pole-attachment issues through

negotiation. US WEST, moreover, has vast bargaining power and is hardly in need of federal regulation to advance its interests.

In summary, not a single case on which the proponents of eliminating the exemption rely supports their claim that government-owned entities are charging excessive pole attachment rates.¹ More important, even if all of these cases did indeed involve excessive rates, they would still collectively amount to only a minuscule fraction of the pole-attachment agreements in which government-entities are involved. The record thus fails to support the conclusion that eliminating the exemption is necessary.

II. ELIMINATING THE EXEMPTION WOULD NOT BE WORKABLE, PRUDENT OR APPROPRIATE

Assuming, without admitting, that at least some government-owned entities were charging excessive pole-attachment rates, APPA submits that eliminating the exemption would not be a workable remedy. Nor would it be a wise or appropriate remedy, for the very reasons that Congress articulated when it enacted the exemption.

As the Commission knows, the policy and legal issues surrounding pole-attachment rates are extraordinarily complex and controversial. Electric utilities have repeatedly advised the Commission in its various rulemakings on pole-attachment rates that they believe each of the Commission's key assumptions about pole heights, usable space, Federal Energy Regulatory Commission (FERC) accounts, available space in electric conduits, etc., to be incorrect. Eliminating the exemption would

¹ In the absence of proof that any government-owned entity is charging excessive rates, it is irrelevant that some local governments are considering providing cable television services themselves. If this proves anything, it is that their communities are dissatisfied with the cable service they are currently receiving.

also expose government-owned entities to the Commission's equally complex and burdensome access requirements, which would complicate matters for all concerned by many degrees.²

Given these complexities, APPA submits that elimination of the exemption would not only be unworkable, but counterproductive. For the vast majority of APPA's members, especially the smaller ones, the cost of mastering and staying abreast of the Commission's pole-attachment requirements would be vastly out of proportion with the revenues they derive from offering pole attachments to others. For many, compliance with the Commission's requirements would simply be impossible in the near term, because they are exempt from FERC regulation and do not maintain the FERC accounts on which the Commission's pole-attachment rate formulas are based.

Elimination of the exemption would also be unnecessary and inappropriate because adequate local mechanisms already exist to control potential abuses. When Congress exempted government-owned entities from federal pole-attachment requirements in 1978, it emphasized the importance of control by local governments, which are best-situated to decide what is fair and equitable for their communities:

S. 1547, as reported, unlike the bill as introduced, imposes no rate-setting formula upon the States. The committee believes that the States should have maximum flexibility to develop a regulatory response to pole attachment problems in accordance with perceived State or local needs and priorities. *The committee is of the opinion that no Federal formula could accommodate all the various local needs and priorities in an entirely satisfactory manner. As noted above, the committee believes that familiarity with the specific operating environment of utilities and cable television systems within a State, as well as the needs and interests of State or local constituents, is indispensable to efficient and equitable regulation.*

. . . The committee wishes to facilitate the replacement of FCC regulation in this area, not to vest within the Commission permanent nationwide pole attachment duties.

² Some of the Commission's access requirements, if applied to local governments, would raise constitutional questions that go well beyond those currently at issue in *Gulf Power Co. v. United States*, CA No. 3:96 CV 381 (N.D. Fla.).

Ultimately, CATV pole attachment ratesetting involves equity considerations. Decisions regarding the allocation of pole costs among users should reflect in some rough sense the ability of cable subscribers and utilities' customers to pay for costs which are passed along to them. Another significant equity consideration is the relative importance of each of the respective services to the communities served. *Considerations of equity should turn on the needs and interests of local constituents. Given the fact that State public service commissions or local regulatory bodies are better attuned to these needs and interests than a Federal agency, jurisdiction over CATV pole attachments should rest with non-Federal officials.*

Because the pole rates charge by municipally owned and cooperative utilities are already subject to a decisionmaking process based upon constituent needs and interests, S. 1547, as reported, exempts these utilities from FCC regulation. Presently, cooperative utilities charge the lowest rates to CATV pole users. *CATV representatives indicate only a few instances where municipally owned utilities are charging unsatisfactorily high pole rental fees.* These rates presumably reflect what local authorities and managers of customers of cooperatives regard as equitable distribution of pole costs and cable television systems.

As to municipally owned utilities, in many cases the same local entity -- the city council -- is responsible finally for granting CATV franchises, and setting pole rates and electric and CATV subscriber rates. There are approximately 2,228 local jurisdictions owning local public power systems. Of these, 2,112 have the authority to grant CATV franchises as well, and about have or 1,008 of these municipal power systems have granted cable franchises. *Thus these localities are in the best position to determine the respective responsibilities of pole users for the costs of erecting and maintaining these facilities.*

S. Rep. No. 580, to accompany S. 1547, 95th Cong., 1st Sess. 17-18 (1977) (emphasis added).

At the time that Congress enacted the municipal exemption from pole-attachment requirements in 1978, it was thus aware of "a few instances where municipally owned utilities are charging unsatisfactorily high pole rental fees." Congress considered responding through federal regulation but rejected that course, finding that local governments were the best arbiters of disputes concerning pole attachment rates and that the Commission was not well-suited to play this role, especially though a single federal formula. When faced with the same choice little more than a year ago, Congress made the same decision in extending the exemption in Section 703 of the Telecommunications Act. Nothing has changed that would warrant a different conclusion today.

III. ELIMINATING THE EXEMPTION WOULD BE INCONSISTENT WITH THE POLICIES UNDERLYING THE TELECOMMUNICATIONS ACT

In the end, the practical effects of requiring government-owned entities to comply with federal pole-attachment requirements would be to make negotiation of pole-attachment agreements less flexible and more time-consuming and costly for all concerned. It would add to federal regulation and bureaucracy. Removing the exemption would therefore run counter to the pro-competitive, deregulatory and stimulative policies of the Telecommunications Act. As articulated in the preamble of the Act, these policies include “promot[ing] competition and reduc[ing] regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”

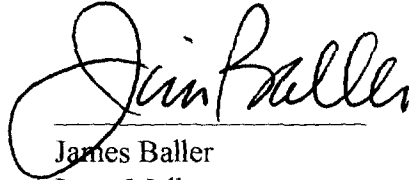
Furthermore, as UTC, The Telecommunications Association noted in its opening comments, citing *Iowa Utilities Board v. FCC*, Nos. 96-3321, et al. (8th Cir. July 18, 1997), eliminating the exemption would be inconsistent with the Telecommunication Act’s policy of encouraging marketplace negotiations and agreements. *See also* Opening Comments of the National Rural Electric Cooperative Association.

Finally, as indicated above, eliminating the exemption would be inconsistent with Congress’s policy of encouraging local governments to resolve essentially local disputes about pole attachments, which is reflected in the legislative history of the 1978 Act and in Congress’s reaffirmance of the exemption in 703 of the Telecommunications Act.

IV. CONCLUSION

For all of the foregoing reasons, APPA recommends that the Commission decline to urge Congress to eliminate the exemption.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jim Baller", written over a horizontal line.

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